Report by the Work Group

of the

Joint Legislative Task Force on Energy Facility Siting

December 15, 2000

CONTENTS

I. INTRODUCTION

Budget Proviso

The 2000 Legislature created the Joint Task Force on Energy Facility Siting through a budget proviso for the Department of Community, Trade and Economic Development. (See Appendix A.) The proviso directed the task force to review and make recommendations regarding the following issues:

a. Jurisdiction and membership of the state siting authority.
b. Procedures of state siting authority.
c. The scope of preemption of proprietary and regulatory functions of local governments and other state agencies.
d. Local government participation.
e. The standards and processes for determining the need for proposed projects.
f. The role of a counsel for the environment.
g. Funding and related costs of participating in the state siting process.
h. Monitoring and oversight of certified facilities.
i. The siting of facilities on public lands.

Process

At the first task force meeting, August 24 in Burien, task force members heard public testimony about the siting process of the Energy Facility Site Evaluation Council (EFSEC) and then divided proviso topics among three work groups. Work group meetings were open to anyone who wanted to attend.

The work groups met first on September 12-13 in Olympia. At this meeting, participants agreed that the state should have a role in the siting of some energy facilities, and that a state siting entity is needed. They met next on September 26-27 in Bellingham, where they merged into one work group. At this meeting they also made three lists of issues: What's working now? What is critical for a review of the siting process to address? And what issues should the group start with? Only the third list was a consensus list. The other two were comprised of suggestions by individual participants. (See Appendix C for the lists of issues.)

Other work group meeting dates were October 11 in Olympia, October 30 in Seattle, and November 9 in Olympia. In addition to these work group meetings the task force and the Energy Facility Site Evaluation Council co-sponsored a symposium on energy facility siting, held October 2-3 in Fife. The symposium was free and open to anyone who wanted to attend.

The work group presented a status report to the task force on October 17 in Bellingham, which also took public testimony about the siting process. They met again with the task force on October 24 in Olympia, and then reported to the task force on November 13 in Olympia.

Purpose of this Report

This report contains the recommendations agreed to by participants in the work group and lists other issues that arose during work group discussions. The appendices contain comments about these issues by the various stakeholders.

II. CONSENSUS RECOMMENDATIONS

One of the questions that arose during work group discussions was whether the siting process needed to be reviewed comprehensively and possibly redesigned "from the ground up," or whether it just needed a few changes--some "tweaking." Some work group participants thought that the process was basically working well and needed only the minor changes put forth in the following recommendations. Others thought that a whole new siting process should be developed and were concerned that advancing the recommendations now could preclude a more comprehensive review. A third point of view was that the minor changes should go forward, but with the recognition that a comprehensive review was needed.

Timing of First Public Hearing

The work group recommends that an informational meeting be conducted before the land-use consistency hearing. In addition, the work group recommends that the 60-day requirement be removed.

RCW 80.50.090. Public hearings

(1) The council shall conduct an informational public hearing in the county of the proposed site ((~~within sixty days of~~)) as soon as practicable after receipt of an application for site certification: PROVIDED, That the place of such public hearing shall be as close as practical to the proposed site.

(2) The council shall conduct a public hearing to ((~~must~~)) determine ((~~at the initial public hearing~~)) whether or not the proposed site is consistent and in compliance with county or regional land use plans or zoning ordinances. If it is determined that the proposed site does conform with existing land use plans or zoning ordinances in effect as of the date of the application, the county or regional planning authority shall not thereafter change such land use plans or zoning ordinances so as to affect the proposed site.

. . . .

Clarifying the EFSEC Administrative Record

The following recommendation attempts to clarify what constitutes a record:

RCW 80.50.100. Recommendations to governor

(1) The council shall report to the governor its recommendations as to the approval or rejection of an application for certification within twelve months of receipt by the council of such an application, or such later time as is mutually agreed by the council and the applicant. Pursuant to RCW 34.05.476, the council's report to the governor shall be based on the administrative record developed during the public hearing held under RCW 80.50.090(3), along with the environmental impact statement prepared

under RCW 43.21C.030, and relevant information presented at other public hearings held by the council under this chapter. If the council recommends approval of an application for certification, it shall also submit a draft certification agreement with the report. The council shall include conditions in the draft certification agreement to implement the provisions of this chapter, including, but not limited to, conditions to protect state or local governmental or community interests affected by the construction or operation of the energy facility, and conditions designed to recognize the purpose of laws or ordinances, or rules or regulations promulgated thereunder, that are preempted or superseded pursuant to RCW 80.50.110 as now or hereafter amended.

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Monitoring of Certified Facilities

The work group recommends that EFSEC limit its monitoring to issues that cannot be delegated to appropriate agencies. It is important to note that this recommendation is linked to the funding issue. All of EFSEC's funding now comes from either siting applications or from the monitoring of certified facilities, in particular, Energy Northwest, and the support for monitoring is the one predictable source of funding to support the agency.

Two-part recommendation:

(1) Give EFSEC discretion in delegating monitoring authority. (Assigned agencies must agree to the delegation. Applicants would pay monitoring fees directly to assigned agencies.)
(2) Increase EFSEC funding to replace lost monitoring fees.

III. BUDGET PROVISO TOPICS

A. JURISDICTION AND MEMBERSHIP OF THE STATE SITING AUTHORITY

Jurisdiction

Background

The Energy Facility Site Evaluation Council (EFSEC) has jurisdiction over the construction, reconstruction, or enlargement (where net increase exceeds dimensions below) of the following:

- Intrastate and the Washington portion of interstate crude or refined petroleum or liquid petroleum pipelines that are larger than six inches minimum inside diameter and at least fifteen miles long.
- Natural gas, synthetic fuel gas, or liquefied petroleum gas pipelines larger than fourteen inches minimum inside diameter for a total length of at least fifteen miles for the purpose of delivering gas to a distribution facility, except an interstate natural gas pipeline regulated by the Federal Energy Regulatory Commission.
- Stationary thermal power plants with generating capacity of 250 megawatts or more.
- Facilities that can receive liquefied natural gas in the equivalent of more than 100 million standard cubic feet of natural gas per day, which has been transported over marine waters.
- Facilities that can receive more than an average of 50,000 barrels per day of crude or refined petroleum or liquefied petroleum gas which has been or will be transported over marine waters, except for storage facilities unless occasioned by such new facility construction.
- Any underground reservoir for receipt and storage of natural gas capable of delivering an average of more than 100 million standard cubic feet of natural gas per day.
- Facilities capable of processing more than 25,000 per day of petroleum into refined products.

Issues that Arose During Work Group Discussions

1. Should the current threshold for thermal generating plants, now 250 megawatts, be changed?

This topic was suggested by several participants, but no agreement could be reached.

2. Regardless of whether the 250 MW threshold is lowered, should the method for calculating a plant's output be clarified?

Several participants studied ways to calculate the 250 MW threshold but the group did not have time to discuss it and make a recommendation.

3. Should the basis for determining what is subject to the siting process and what is not be reexamined?

The work group listed several approaches for determining which facilities should come under state siting jurisdiction, but did not discuss or compare them fully.

a. Establish "opt in" provisions for some facilities that are not now under EFSEC's jurisdiction. Participants raised two topics related to this approach.

(1) The first topic was who should be able to decide that a proposed facility could opt in: just the applicant, just the local government, either could make the change, or both would have to agree to the change. A reason given for a local government deciding to turn primary jurisdiction over to the state was lack of resources and technical staff for processing a complex application. A reason for an applicant to decide to opt in was because of local opposition and the likelihood that the state process would be better able to balance local and state interests.

(2) The second topic was whether non-hydro renewable generating technologies, such as wind and solar, should be allowed to "opt in" to the state siting process, a suggestion made by a participant. The intent would be to help implement the state energy policy, which encourages the development of non-hydro renewable generating technologies. Such facilities are not subject to the state process now, regardless of size and amount of power they would generate. Some renewables, particularly wind, are multi-jurisdictional and therefore developers now have to secure permits from various counties and local authorities. Being able to opt in the EFSEC process could presumably help simplify that process.

b. Assume that local government will have jurisdiction unless a proposal raises some specified level of conflict, and then assign it to the state siting process. The work group decided that this approach was not worth pursuing.

c. Set criteria for determining state jurisdiction based on the level of impact for various types and sizes of facilities. The group thought this approach was worth considering but did not have time to discuss it.

d. Allow an applicant for a facility currently under state siting jurisdiction to "opt out" of the state process if the project is located entirely in one local jurisdiction. (Left open is the question of whether the local jurisdiction's consent would be necessary.) The work group decided that this approach was not worth pursuing.

e. Establish different review processes for different types of facilities. The work group thought this approach was worth considering but did not have time to discuss it.

4. <u>Should there be a time limit for the duration of a certificate for certified but not yet constructed projects?</u>

This issue was discussed by the group, but no agreement was reached. Members of the Energy Facility Site Evaluation Council left the room for this discussion.

EFSEC has certified four natural gas generating plants that have not yet been constructed. The statute is silent about how long a site certificate is valid, but EFSEC has granted each of them a

ten-year certificate with the following condition: after the first five years, the certificate holder must certify either that the project meets current regulations or else identify changes needed to the certificate for it to meet current regulations.

The lack of a time limit raised several concerns:

- Such facilities, if built, may incorporate outdated technology with greater environmental impact.
- Having a backlog of certified but unbuilt facilities may discourage other developers from applying for newer, more efficient technologies.
- As happened with a transmission line in Oregon, neighbors to the proposed facility may change in the years that the proposal is dormant, bringing forth a new round of public concern and opposition.
- The state needs to forecast cumulative impacts of siting energy generating facilities.

Work group participants identified several questions to be researched:

a. Do EFSEC's attorneys consider agency practice to be sufficient, or should a limitation be in statute?

b. Do the conditions of an air quality permit effectively limit the duration of a site certificate? Air operating permits are issued for five-year terms and may be re-opened under limited circumstances. One of those circumstances is if major new requirements are issued that air permits must comply with. In that case, an air operating permit must be reopened not later than 18 months after the requirements go into effect , but only if three years remain on the permit. The other kind of air permit (a Prevention of Significant Deterioration permit) is issued at the time of construction and is not a renewable permit.

Membership

Background

The Energy Facility Site Evaluation Council consists of ten fixed members (a citizen chair compensated on a per diem basis and nine members from state agencies) and, when an application is before the Council, representatives from the local governments and ports where the project is proposed to be sited:

- A chair appointed by the governor with the advice and consent of the senate.
- The directors, administrators, or their designees, of the Utilities and Transportation Commission and the departments of Ecology; Fish and Wildlife; Health; the Military; Community, Trade and Economic Development; Natural Resources; Agriculture; and Transportation.
- A member appointed by the appropriate county legislative authority of every county wherein an application for a proposed site is filed.

- A member appointed by the city legislative authority of every city within whose corporate limits an energy plant is proposed to be located.
- A nonvoting member appointed by any port district wherein an application for a proposed port facility is filed.

Issues that Arose During Work Group Discussions

1. The ex parte rule (Please see discussion below under "Procedures, Adjudication." For a discussion of different options for council membership, please see "Procedures, Changing Components of EFSEC's Structure--Some Implications.")

2. The cyclical nature of EFSEC's caseload causes problems for members and their agencies.

When an application is before the Council, the effect on state members can be like having a second job. An EFSEC proceeding can take 50 or even 60 percent of their time. They are, nevertheless, still expected to carry out the assignments of their regular jobs. For agencies, this can mean loss of an employee's presence and time. Local government members have similar concerns, since elected officials may miss other important meetings and duties. This issue is likely to become even more critical soon as EFSEC is expecting to receive three or four applications.

The work group discussed one suggestion, to make membership of some state agencies optional. The Departments of Health, Military, Agriculture, and Transportation do not always have an interest in an application before EFSEC. Some departments may need to be involved in just monitoring, others only when they have property interests. This option would change the statute so that these agencies could decide on a case-by-case basis whether to have a member participate in an EFSEC proceeding. However, this option would only address the needs of some agencies. (See discussion under Adjudication, ex parte rules below).

B. PROCEDURES

Overview of Siting Process

Background

The basic components of the EFSEC process:

- An optional preliminary site study.
- An application.
- Review of the application.
- The SEPA process.
- Public hearings associated with SEPA, local land use regulations, and/or air and water permits.
- Adjudication.
- A recommendation to the governor.

- A final decision by the governor.
- Litigation/appeal to court (if necessary).

As the flowchart of the EFSEC siting process shows (Appendix G), the process is essentially end-loaded. EFSEC incorporates some specific WACs as standards, but otherwise does not base decisions on standards. Instead EFSEC establishes terms and conditions for the draft site certification agreement as a result of adjudication, SEPA, and other permit hearings. EFSEC's current procedures encourage resolution of issues up front, before adjudication, and this has occurred in several EFSEC cases. However, parties typically become engaged in the process later on and there is no way to mandate that they negotiate sooner.

Governor's Role

Background

The council reports to the governor its recommendation as to the approval or rejection of an application. If the council recommends approval, it also submits a draft certification agreement with the report. The governor makes the final decision within 60 days of receiving a council's report. The governor shall take one of the following actions:

- Approve the application and execute the draft site certification agreement;
- Reject the application; or
- Direct the council to reconsider certain aspects of the draft certification agreement.

If the governor directs the council to reconsider certain aspects of the draft certification agreement, the council does so expeditiously and then resubmits the draft certification to the governor, whereupon the governor has 60 days either to approve the application and execute the certification agreement or reject the application.

Issues That Arose During Work Group Discussions

1. Should the governor be the final decision-maker following EFSEC's review and recommendation?

2. May the governor direct the council to reconsider an application when there is no draft certification agreement, in other words, when the recommendation is to reject the application?

3. Should the statute specify a basis for the governor's decision that could serve as the basis for an appeal of the governor's decision?

Adjudication

Background

The EFSEC process depends heavily on the adjudicative component, a quasi-judicial proceeding conducted in accordance with the Administrative Procedure Act and specified in the agency's rule.

Issues That Arose During Work Group Discussions

1. The ex parte rule limits communications between members of the Council and the state agency or local governments they represent.

The original intent of having state governmental members on the siting commission was so that representatives of state agencies could speak for their agencies and thus coordinate the state's position. This creates a problem, however, for agencies that also intervene in EFSEC proceedings: their members cannot communicate with agency management, nor with agency experts who are assisting the intervention. This constraint in turn makes coordinating a state position more difficult since some members cannot speak for their agency or draw upon agency expertise.

The ex parte rule causes similar problems for members from local government, since in their quasi-judicial role they may not discuss the application with fellow elected officials or constituents.

There is no consensus that ex parte rules should be modified for an EFSEC adjudicatory process. Several participants suggested solutions for this concern, including:

- Change membership to a citizen board, like the Pollution Control Hearings Board or the Utilities and Transportation Commission. The board could be part time or full time as in California, but then it would need other duties because of the cyclical nature of EFSEC's caseload.

- Agencies can choose not to intervene in EFSEC proceedings.

- Incorporate a narrowly applied exemption from the Administrative Procedures Act (notably RCW 34.05.455) within chapter 80.50 RCW for communications between agency representatives and their respective agency personnel. (This option was submitted in writing by a participant and not raised at a work group meeting.)

2. The ex parte rule limits communication between Council contractors and parties regarding the SEPA process and other permit information and review.

3. The EFSEC statute is not explicit as to what constitutes a record under the EFSEC process.

Adjudication and SEPA both produce records, but the statute is not explicit about what constitutes the record from these differing processes, one of which is open to anyone, the other being limited to intervenors. The EFSEC process may also involve other permits such as water quality or air quality, which may also create a record.

Consensus Recommendation

The intent of the following statutory change is to clarify what constitutes the record for an EFSEC proceeding.

> 80.50.100. Recommendations to governor--Approval or rejection of certification--Reconsideration
>
> (1) The council shall report to the governor its recommendations as to the approval or rejection of an application for certification within twelve months of receipt by the council of such an application, or such later time as is mutually agreed by the council and the applicant. Pursuant to RCW 34.05.476, the council's report to the governor shall be based on the administrative record developed during the public hearing held under RCW 80.50.090(3), along with the environmental impact statement prepared pursuant to RCW 43.21C.030 and relevant information presented at other public hearings held by the council pursuant to this chapter. If the council recommends approval of an application for certification, it shall also submit a draft certification agreement with the report. The council shall include conditions in the draft certification agreement to implement the provisions of this chapter, including, but not limited to, conditions to protect state or local governmental or community interests affected by the construction or operation of the energy facility, and conditions designed to recognize the purpose of laws or ordinances, or rules or regulations promulgated thereunder, that are preempted or superseded pursuant to RCW 80.50.110 as now or hereafter amended.
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> ....

The State Environmental Policy Act and the EFSEC Process

Background

Site certification for energy facilities generally requires the completion of six major steps:

- Application submittal.
- Application review.
- Initial public hearings.
- Environmental impact statement.
- Adjudicative and permit review.
- Recommendation to the governor.

The guidelines for the first step in the process--the application--requires the submittal of information on sixty different subjects dealing with environmental and socioeconomic impacts, including measures the applicant will take to mitigate or offset impacts the project may have.

The State Environmental Policy Act (SEPA) was adopted in 1971 to ensure that the environmental impacts of proposed projects are understood by decision makers, and that significant adverse environmental impacts are avoided or mitigated. An environmental impact statement (EIS) is required for projects having a probable significant adverse environmental impact. In addition, an important function of an EIS is to identify alternatives to the proposed action that would serve to avoid or minimize the identified impacts. Most energy projects under EFSEC's jurisdiction require an EIS.

For energy facility siting, EFSEC is the lead agency under SEPA and hires an independent consultant at the applicant's expense to develop an EIS for the project. The EIS is based on the information provided in the application and developed throughout the course of the proceedings.

The adjudicatory proceeding required under RCW 80.50.090(3), and the environmental review required under SEPA, promote different approaches to decision making. Adjudicatory proceedings are contested hearings in which project proponents, the Counsel for the Environment (RCW 80.50.080), and intervenors present arguments for and against the proposed project. The State Environmental Policy Act requires the responsible official (EFSEC in this case) to consult with public agencies having jurisdiction or expertise with respect to the environmental impacts of the proposal. The lead agency must also receive comment from the public. When the two processes are conducted simultaneously, the prohibition on ex parte communication under an adjudicatory proceeding can constrain the free exchange of information required under SEPA.

Issues That Arose During Work Group Discussions

1. How should SEPA apply to energy facility siting?

2. Can some of the duplication between site certificate applications, adjudicatory proceedings, environmental impact statements, and permits be eliminated?

3. Can the EIS and adjudicatory proceeding be sequenced so as to preserve the integrity of both processes? (EFSEC is addressing this issue administratively. See flowchart in Appendix G.)

4. There is frustration over the length of the process. Are there ways to streamline the process through better coordination of SEPA analysis and adjudication?

The Growth Management Act and the EFSEC Statute

Background

The legislature created the EFSEC process in 1970. Under this process, EFSEC is required to determine if a proposed site conforms with existing land use plans or zoning ordinances. When

the Growth Management Act was passed in the early 1990s, the legislature did not amend the EFSEC process to include ordinances and plans required by the GMA.

By statute, EFSEC must conduct a public hearing in the county of a proposed site within 60 days of receiving an application for site certification. At this hearing, EFSEC must determine if the proposed site is consistent with local land use plans or zoning ordinances.

Some citizens believe the current hearing requirement is inadequate to notify the public that a potential site is being considered. They desire an informational meeting earlier in the siting process. In addition, members of the EFSEC staff have told the work group that 60 days is not enough time to conduct a land-use consistency determination.

Issues That Arose During Work Group Discussions

1. Should the siting process preempt local law and state law with regard to both regulatory and proprietary powers?

2. How should the consistency of EFSEC criteria and local ordinances be determined? (This is a problem especially when a local government classifies an energy facility as a conditional use.)

3. Is it necessary to clarify that the EFSEC statute is consistent with the GMA?

4. Should local jurisdictions be encouraged to identify locations for energy facilities (*i.e.* pre-siting)?

Consensus Recommendation of the Work Group

The work group recommends that an informational meeting be conducted before the land-use consistency hearing. In addition, the work group recommends that the 60-day requirement be removed.

RCW 80.50.090. Public hearings

(1) The council shall conduct an informational public hearing in the county of the proposed site ((~~within sixty days of~~)) as soon as practicable after receipt of an application for site certification: PROVIDED, That the place of such public hearing shall be as close as practical to the proposed site.

(2) The council shall conduct a public hearing to ((~~must~~)) determine ((~~at the initial public hearing~~)) whether or not the proposed site is consistent and in compliance with county or regional land use plans or zoning ordinances. If it is determined that the proposed site does conform with existing land use plans or zoning ordinances in effect as of the date of the application, the county or regional planning authority shall not thereafter change such land use plans or zoning ordinances so as to affect the proposed site.

Changing Components of EFSEC's Structure--Some Implications

Background

It became apparent early in the work group discussions that many topics in the budget proviso were interrelated, that one component of the siting process could not be changed without affecting others. The purpose of the following discussion is to show how some topics are linked and to point out some of the implications of changing different components.

Changing Membership: The basic alternative to a council comprised of government members is some sort of citizen board. The linkages and implications are described below:

Getting qualified citizen members: Given the time that serving on the council can take, there was concern over attracting qualified citizen members. California has fulltime members, but assigns them other duties. Oregon has part time members, but requires them to attend on average only about one and one-half days of meetings every six weeks.

Jurisdiction: Expanding the role of the council members to make them full time would require some expansion of jurisdiction.

Funding: At present, state agencies with designees on the council (and affected local governments when an application is before the council) in effect pay much of the cost of membership. (An applicant starts paying after the 10th day of hearings, but the agency or local government is still without the services of its appointee whenever EFSEC meets.)

Making the process more "front-loaded": Some participants were intrigued by Oregon's siting process, which resolves most issues before adjudication, thus reducing or even in some cases eliminating the need for adjudication. This approach provides more certainty and less process.

Staffing: The Oregon process relies heavily on staff.

Standards: The Oregon process has standards that a proposal must meet. In other words, Oregon addresses many issues generically, leaving fewer to be decided on a case-by-case basis. Washington, by contrast, decides most issues case-by-case through SEPA and adjudication.

Funding: Increasing staff responsibilities would require more funding. Establishing standards would require funding for rule making.

Changing procedures for participating in adjudication: An alternative based on the Oregon model would make adjudication open to anyone with an issue under the purview of the council.

Staffing/funding/standards: Opening adjudication to all parties works in Oregon because adjudication is limited to disputes over whether a standard has been met. This in turn works

because the front-loaded approach narrows the scope (and number of parties) to be adjudicated.

Counsel for the environment: Under this alternative a counsel for the environment may not be necessary. Oregon does not have this function.

Nature of the council's decision: The alternative to the council making a recommendation is for the council to make a final decision.

Governor's role: Having an elected official, the governor, make the final decision, ensures that the final decision maker is directly accountable to the public.

C. STATE AND LOCAL GOVERNMENT REGULATORY PREEMPTION

Background

Preemption is the power of one law to supersede another. The legislature has granted the governor, through the EFSEC process, the power to preempt laws and regulations concerning the location, construction, and operational conditions of certain energy facilities. This preemptive power has been described in two ways. First, it can be said that EFSEC may "stand in the shoes" of a state or local agency and reach a decision by applying the same rules those agencies would have used. Or it can be said that EFSEC may use its authority to override any conflicting state or local laws.

EFSEC is the exclusive siting authority for state regulatory issues. For example, if the construction of an energy facility were to obstruct the natural flow of a stream, EFSEC certification would supersede hydraulic project approval by the Department of Fish and Wildlife.

EFSEC is also responsible for determining if a proposed project is consistent with county or regional land use plans or ordinances. If the Council determines the project is not consistent with local land use plans, the applicant can apply to the local agency for a variance to the plan or ordinance. If the local agency does not grant a variance, the applicant can request state preemption of the local zoning ordinance. If the applicant requests state preemption, an adjudicative hearing is held in order for the Council to hear testimony concerning the request. If the Council approves a request, the Council must give due consideration to community interests and local rules and ordinances in the recommendation to the governor.

Issue That Arose During Work group Discussions

1. Should the siting process preempt local law with regard to regulatory powers? (See Section I for the issue of siting facilities on public land.)

D. LOCAL GOVERNMENT PARTICIPATION

Background

As described in the EFSEC white paper (Appendix D), local government interests are represented in the EFSEC process in five basic ways.

X EFSEC must review the project for consistency with local ordinances, development plans, and comprehensive plans and must invite comment from local authorities and citizens.

X Local governments (counties and cities) participate as voting members of EFSEC when an application for a proposed site is filed with the Council and the site will be located within the jurisdiction of a particular local government.

X To protect their interests, localities may intervene as parties in an EFSEC proceeding.

X During the permitting, monitoring, and enforcement processes, EFSEC may consult with or contract with local authorities for permitting, monitoring and enforcement activities.

X For projects that fall below the 250 megawatt threshold for EFSEC jurisdiction, many of the necessary permits for the project are processed by local governments.

Issues That Arose During Work Group Discussions

1. Local governments sometimes feel that their voices and concerns are not adequately heard or addressed--at least in comparison with the more typical local siting process.

2. The EFSEC process is complex and unlike the familiar process local governments follow when reviewing local land use applications.

3. Funding is a major issue for local participation in the state process. Local governments can be burdened by the staff commitment in both time and cost required to support their participation in the process, either as a member of the Council or as an intervenor. They may not have the technical expertise needed to evaluate proposed site applications.

4. The time periods for responding to an application are short, adding to the burden on local governments who participate in the process. For example, hearings for conditional use permits and variances may take longer than the 60 days EFSEC has to determine consistency with existing land use plans and zoning ordinances.

E. STANDARDS AND PROCESSES FOR DETERMINING NEED FOR PROPOSED PROJECTS

Background

Written in 1970, the RCW chapter concerning EFSEC begins with an intent section that says the state of Washington recognizes “the pressing need for increased energy facilities.” This same

section also requires EFSEC to “balance the increasing demands for energy facility location” with the public interest, which includes preserving the environment.

In a separate RCW chapter, the legislature in 1981 established the basic provisions of the state energy policy, to be administered by the State Energy Office (now the Energy Division of the Office of Trade and Economic Development). This energy policy is not referenced in the EFSEC RCW chapter. Among other provisions, the state energy policy requires that the state encourage the development of renewable resources and energy conservation and that the "development and use of energy be consistent with the statutory environmental policies of the state." The state energy policy was revised in 1994 to include the state energy strategy as "primary guidance for implementation of the state's energy policy."

In addition to the state energy policy, other policy components concerning energy appear throughout the RCW, such as insulation requirements in the state building code, measures to encourage cogeneration by gas and electric companies regulated by the WUTC, and conservation and renewable energy requirements in the Energy Financing Voter Approval Act.

Issues That Arose During Work Group Discussions

1. Should there be a clear connection between the EFSEC statute and the state energy policy?

2. Should there be an explicit carbon dioxide standard for thermal generating plants? (EFSEC has recently recommended that a future natural gas-fired facility mitigate its carbon dioxide emissions.)

3. Should the qualifying words “pressing,” “increased,” “increasing,” and “abundant” in the intent section of the EFSEC statute be removed? (Some participants believe this would strike a neutral balance between energy needs and other considerations.)

F. THE ROLE OF A COUNSEL FOR THE ENVIRONMENT

Background

Whenever the council receives an application, the attorney general appoints a counsel for the environment to represent the public and its interest in protecting the quality of the environment. The office of the attorney general pays for the counsel for the environment. The counsel participates as a party.

Issues that Arose During Work Group Discussions

2. <u>The workload of the counsel for the environment</u>:

Citizens praised the efforts of the counsel for the environment, but some wondered how one person could do the job. The counsel for the environment is expected to defend the interests of the people of the state and also receives inquiries from, in some cases, hundreds of individual

citizens. Some of these individual concerns can be defended by the counsel, others may not be because they are specific to the individual. Also, it can be difficult to predict how much time is needed for a case.

3. Relationship to gaining status as an intervenor:

Some concerned citizens testified that one of the reasons they had been denied intervenor status was that the counsel for the environment would be representing their interests.

G. FUNDING AND RELATED COSTS OF PARTICIPATING IN THE STATE SITING PROCESS

Background

EFSEC has two major funding sources: application fees and monitoring fees. Of these two sources, monitoring usually provides the only predictable funding source because application fees fluctuate according to the number of applications that are filed.

Issues That Arose During Work Group Discussion

1. How can adequate funding be provided for state agency staff time and Council members; for the counsel for the environment; and for local government participation, as both Council members and intervenors?

2. Will it be possible to find an EFSEC chair willing to work on a per diem basis when the caseload is high, or should some other finding basis be established?

H. MONITORING OF CERTIFIED FACILITIES

Background

The EFSEC statute directs the Council to regulate the operation of approved energy facilities. The Council performs this duty by using state agency personnel and expertise, while retaining final authority to determine compliance with permits issued by the Council and site certification agreements.

Energy facilities that are permitted by EFSEC pay EFSEC for ongoing monitoring and compliance. These monitoring fees provide the only predictable funding source for EFSEC. This is because the other major funding source, application fees, fluctuates according to the number of applications that are filed.

Some work group participants said that for some permits current monitoring is inefficient because it adds an additional layer of bureaucracy.

Issues That Arose During Work group Discussions

1. Should the Council be removed as a middleman and should agencies be given direct monitoring authority and funding?

2. Should EFSEC be given the discretion to delegate routine monitoring to agencies?

Consensus Recommendation of the Work Group

Two-part recommendation:

(1) Give EFSEC discretion in delegating monitoring authority. (Assigned agencies must agree to the delegation. Applicants would pay monitoring fees directly to assigned agencies.)
(2) Increase EFSEC funding to replace lost monitoring fees.

I. SITING FACILITIES ON PUBLICLY OWNED LAND

Background

"Preemption" is the power of one law to supersede another. The legislature has granted the governor, through the EFSEC process, the power to preempt laws and regulations concerning the location, construction, and operational conditions of certain energy facilities.

The work group cannot agree if EFSEC's exclusive authority extends to preempting local governments and state agencies when they own or manage property. For example, does EFSEC have exclusive authority to decide that a pipeline will travel across public property that is controlled and managed by the State Parks Commission? EFSEC answers yes. Site certification, EFSEC contends, supersedes any law granting the Parks Commission the authority to manage parklands. In EFSEC's view, certification of a site is binding on the Parks Commission as to the location of energy facilities. However, because EFSEC does not assert that it has authority to transfer real property interests, either the Parks Commission would convey any real property interest (*e.g.*, easement) required by the certification, or the applicant would acquire the real property interest by eminent domain if permitted by law.

The issues raised under this topic also apply to other public lands, such as municipal parks, wildlife management areas, hatchery grounds, state-owned aquatic lands, and state highways. (See discussion paper in Appendix F.)

Issues That Arose During Work Group Discussions

1. <u>Siting facilities on public lands</u>.

   a) Should the legislature prohibit the siting of energy facilities on some types of public land, such as parks, wilderness areas, and critical areas?

b) Should the legislature permit the siting of certain energy facilities on some types of public land only if the facilities meet higher standards? (For example, for linear facilities if no less invasive alternative route is available.)
c) Should the legislature permit limited intervention to local governments or state agencies whose property-management duties may be preempted by EFSEC?
d) Should a certificate holder be required to indemnify and hold harmless a local government or state agency when public property is transferred to an applicant?

2. Compensating the public for the use of public lands.

a) Should the legislature specify a process to compensate the public for the use of public land by an energy facility?
b) Should the legislature specify a process for compensating local governments or state agencies for the costs incurred in participating in a site evaluation?